Office Supreme Court, U. S.
FILED
DEC 24 1925
WM. R. STANSBURY
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1925.

NO. 169.

THE VIRGINIAN RAILWAY COMPANY, *Petitioner*,

vs.

A. J. MULLENS, *Respondent*.

UPON A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA.

BRIEF OF COUNSEL FOR RESPONDENT.

LOVETT PRINTING CO., LAW PRINTERS, CHARLESTON, W. VA.

# INDEX


| | Page |
|---|---|
| Table of cases | 2 |
| Statement of the case | 3 |
| Propositions and authorities | 5 |
| Argument, general, | 7 |
| Argument, Immunity under federal control | 11 |

## TABLE OF CASES.


Atlantic C. L. Ry. Co. vs. Southern Cotton Oil Mills, 323, 106 S. E. 337, 15.

Baggot vs. Southern Ry. Co., 300 Fed. 337, 10.
Brown vs. St. L. & S. F. Ry. Co., 268 S. W. 679, 6, 12.

Central Trust Co. vs. Wabash Ry. Co., 57 Fed. 441 6.
Cline vs. N. & W. Ry. Co., 69 W. Va. 436, 71 S. E. 705 6.
Covert vs. C. & O. Ry. Co., 85 W. Va. 864, 100 S. E. 854 6.
Cumberland T. & T. Co. vs. Lawrence, 271 Fed. 81 6, 11.

Gwinn vs. Ohio River Rd. Co., 46 W. Va. 151, 33 S. E. 87 6.

Hines vs. Woodson, 280 Fed. 966 6, 11.

L. & N. Ry. Co. vs. Tuttle, 258 S. W. 688 6, 13.

McPherson vs. Railroad Admin., 203 P. 912 6, 14.
Morris Ave. Bridge vs. N. Y. C. Rd. Co., 174 N. Y. S. 682, 14.
Mullens vs. Virginian Ry. Co., (W. Va.), 123 S. E. 287, 5, 6, 9.

Reno vs. Seaboard A. L. Ry. Co., 120 S. C. 7, 112 S. E. 337, 15.

Taylor vs. C. & O. Ry. Co., 84 W. Va. 442, 100 S. E. 218, 6.
Union Trust Co. vs. Cuppy, 26 Kan. 754, 6.

# Supreme Court of the United States

OCTOBER TERM, 1925

NO. 163.

THE VIRGINIAN RAILWAY COMPANY, *Petitioner,*

*vs.*

A. J. MULLENS, *Respondent.*

UPON A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA.

BRIEF OF COUNSEL FOR RESPONDENT.

## *STATEMENT OF THE CASE.*

The statement of counsel for the Petitioner is incomplete, and in our opinion is incorrect and misleading in certain instances. Therefore, we state the facts necessary to a determination of the points in controversy as follows:

In 1904, the Respondent conveyed to Deepwater Railway Company a described strip of land for a right of way for a railroad, "together with such additional land on either side of the strip hereinafter described, as may be

necessary for the slopes of cuts and fills and for changing the channels of streams, *such extra widths to be taken and used so as not to unnecessarily damage the residue of the land*". (R. 77). Shortly after this deed was made said Company entered upon the strip of land so acquired from the respondent, and other lands acquired from others for the same purpose, and constructed a railroad, which was completed on March 1, 1906. (R. 12 and 67). In constructing said railroad, the channel of Slab Fork Creek was filled up about two-thirds of the distance across it and for a distance of about four hundred feet up and down the stream on the bank thereof opposite the residue of respondent's land, and the bed of the remainder of the channel of the stream was covered with large boulders for a considerable distance up and down the same. (R. 13 and 81 map).

By deed dated April 22, 1907, (R. 71), said Deepwater Railway Company conveyed all its property, rights, privileges and franchises, including the property and rights conveyed to it by respondent, to the petitioner, and, as a part of the consideration for such conveyance, the petitioner assumed all lawful debts, liabilities, contracts and other obligations of said Deepwater Railway Company (R. 76). The petitioner has owned said railroad at all times since and has at all times since operated said railroad except during the time that the same was operated by the United States Government.

Immediately after said fill was made, the water was forced out of the natural channel of the stream and onto and over respondent's land, at each time there was a rise, but, due to the fact that trees, bushes, etc., were growing on the bank, no great amount of the land was washed until after these bushes and trees had been undermined and washed away, leaving the bank unprotected (R. 15

and 16). These conditions were known to and observed all along by the representatives of the petitioner (R. 56 and 69).

In February, 1918, and in July, 1919, unusually high rises occurred in the stream, and due to the fact that the protection afforded by the trees and shrubbery had been washed away, the water was forced out of the channel of the stream and over respondent's land, and did the principal part of the injury for which damages were recovered in this action (R. 15, 16, 17, 18 and 19). This action was instituted on June 14, 1921, and the declaration was filed July 6, 1921, and was continued from time to time until November 9, 1922, when the petitioner filed a plea of the general issue, a special plea of the statute of limitations and a special demurrer in which it set up the fact that it was not liable on account of its road being in the possession and control of the United States Government at the time the principal part of the injury was done (R. 3, 4, 5, 6, 7 and 8). This demurrer was overruled (R. 9), and the petitioner requested the Court to instruct the jury that it was not liable for any injury that occurred between December 28, 1917, and March 1, 1920, which the Court refused (R. 84). There was a verdict and judgment for the plaintiff, and the highest Court of the State of West Virginia having refused to review this judgment, the case was brought to this Court on a writ of certiorari.

## PROPOSITIONS RELIED UPON.

1. Where, in 1904, a land owner conveyed to a Railroad Company a described strip of his land for a railroad right of way, "together with such additional land on either side of the strip" * * * "as may be necessary for the slopes of cuts and fills and for changing the channels of streams, such

*extra widths to be taken and used so as not to unnecessarily damage the residue of the land"*, such a provision in the deed constitutes a contract between the land owner and the Railroad Company, and if it constructs its railroad on such right of way in such manner as to constitute a violation of such contract and also as to constitute a recurring, intermittent continuing nuisance, it will be held liable to such land owner for such damages as he may sustain by reason of such violation of such contract and also by reason of the construction and maintenance of such nuisance. A. J. Mullens vs. Vgn. Ry. Co., (W. Va.) 123 S. E. 287. Cline vs. N. & W. Ry. Co., 69 W. Va. 436, 71 S. E. 705. Covert vs. C. & O. Ry. Co., 85 W. Va. 64, 100 S. E. 854. Taylor vs. C. & O. Ry. Co., 84 W. Va. 442, 100 S. E. 218.

2. Where, in 1907, after such Railroad Company has completed the construction of its railroad on such right of way, in such manner as to violate such contract and also to constitute a recurring, intermittent continuing nuisance, it conveys all its property, rights, privileges and franchises of every kind and nature, including the rights so conveyed by such land owner, to another Railroad Company which is a part of the consideration for such conveyance, assumes all its "debts, liabilities, contracts and other obligations", such other Railroad Company will be held liable to such land owner for such damages as he may thereafter sustain as a result of the violation of such contract and the continuance of such nuisance. A. J. Mullens vs. Vgn. Ry. Co., *Supra;* Gwinn vs. Ohio River Rd. Co., 46 W. Va., 151, 33 S. E. 87, 76 A. S. R. 806; Union Trust Co. vs. Cuppy, 26 Kan. 754; Central Trust Co. vs. Wabash Ry. Co., 57 Fed. 441.

3. In an action by such land owner against such other Railroad Company to recover damages sustained by him on account of the washing away

and destroying of the residue of his land, and the fencing and crops thereon, which was due and caused by the improper and unlawful manner in which such Railroad Company constructed its railroad, and in which such other Railroad Company continued and maintained the same, with full and complete knowledge and notice of the fact that such manner of construction was in violation of such contract and also constituted a recurring, intermittent continuing nuisance and of the injurious effects thereof, and without making any effort to comply with the provisions of the contract or to abate the nuisance or its injurious effects, the fact that its railroad was under the control of and being operated by the Government, pursuant to the acts of Congress and the proclamations and orders of the President, at the time when the greater part of the damages sued for occurred, constitutes no defense to such action unless it is shown that such other Railroad Company had not had an opportunity to comply with such contract and thereby abate such nuisance at any time prior to the taking over of its railroad by the Government, or that it was prevented from doing so by reason of such control and operation of its railroad by the Government. Cumberland Telegraph and Telephone Co. vs. Lawrence, 271 Fed. 81; Hines vs. Woodson, 280 Fed. 966; Brown vs. St. L. & S. F. Ry. Co., (Mo.) 268 S. W. 679; L. & N. Rd. Co. vs. Tuttle, 258 S. W. 688; McPherson County vs. U. S. Rd. Admin. (Kan.) 203 P. 912.

*ARGUMENT.*

The petitioner bases the contention that it is not liable for the damages resulting from the injury done to the land by the washing away, during the period of federal control, upon the fact that the obstruction, which it

terms a "nuisance", was created and placed in the stream by its predecessor, the Deepwater Railway Company, and also upon the theory and pretense, set up for the first time in its argument in this Court, that it had no notice or knowledge of the existence of this nuisance until after its railroad had been taken over by the Government under the Federal Control Act, and, being deprived of all power and authority to abate this nuisance at any time during Federal Control, the Government, and not the petitioner, is liable for the injury that occurred during federal control.

If the petitioner can escape liability because it did not create the obstruction which caused the injury and was ignorant of its existence from the time it purchased the railroad until federal control commenced, it is likely that the Government could also escape liability on the same ground, and the respondent left without remedy for the serious injury which he has suffered.

Whether the "nuisance" consists of the structure which was placed in the channel of the stream, or the effects produced by that structure forcing the water from its natural and proper channel over and against respondent's land, the contention is not based on the actual facts and the theory is incorrect. Whether the thing or condition which caused the injury to plaintiff's land is properly termed a nuisance, the petitioner cannot deny full and complete knowledge and notice of its existence. At the time it purchased the railroad in 1907, the deed under which it claimed title to its right of way through the respondent's land was on record, and that deed showed on its face, in plain and unmistakable language, that it was acquiring a right, which respondent had conveyed to its predecessor, to take a sufficient amount of respondent's land, in addition to the strip on which its railroad had

been built, to widen the channel of this stream, and that it was required by a provision in said deed to take and use such additional portion of respondent's land in such a manner as to protect the residue thereof. In addition to this, it could be plainly seen on the ground that two-thirds of the bed of the stream had been filled up in constructing the bed for the railroad, and that the remainder of the bed of the stream had been covered up with large boulders. All along, during all the time, from the purchase of the railroad up to the time federal control commenced, the agents and servants of the petitioner could plainly see and observe the effects that this choking of the stream was continuously taking upon the respondent's land by washing away the trees and shrubbery which had theretofore protected and preserved the banks. They could also plainly see that the petitioner's predecessor had not complied with its contract by which it was bound to widen the channel of this stream and thereby protect respondent's land. The testimony of petitioner's own witnesses, Lovern, the section foreman (R. 56), and Traugett, the chief engineer (R. 69), shows that it had full and complete knowledge of the existence of this nuisance.

The theory upon which the contention is based is incorrect, not only because the petitioner and its predecessor was under a contractual obligation to correct the conditions which resulted in the injury to the respondent, but also because it had full and complete knowledge of the existence of the nuisance and the evil effects which it was having and would plainly continue to have upon respondent's land.

During the pendency of this action in the Courts of the State of West Virginia, the respondent instituted a suit in chancery, in the Circuit Court of Wyoming

County, West Virginia, in which he sought the issuance of a mandatory injunction to compel the petitioner to abate the nuisance which caused the injury resulting in the damages sued for in this action, and the petitioner based its chief defense in that chancery proceeding on the fact that its predecessor acquired the right to obstruct this stream from the respondent through the deed by which the respondent conveyed the right of way for said railroad, and the petitioner having acquired such rights from its said predecessor, the respondent was not entitled to have such nuisance abated by injunction. This chancery cause was properly transferred to the Supreme Court of Appeals of West Virginia, and that Court held that the respondent had no right to abate this nuisance by a mandatory injunction because the obstruction was placed in the stream pursuant to an express contract between petitioner's predecessor and the respondent. See Mullens vs. Vgn. Ry. Co., 123 S. E. 287.

We therefore submit that petitioner has at all times, since it purchased said railroad, been under obligations, both legal and contractual, to abate the nuisance, if such it may be called, and having failed to do so it is liable for the damages suffered by the respondent on account thereof. It had more than ten years before federal control commenced within which to comply with this contract and abate this nuisance. Even if it had been actually prevented from compliance by the Government, during federal control, which it has not even attempted to show, it would still be liable because it had ample opportunity before that. At any rate, the Circuit Court of Wyoming County, West Virginia, held in this case that it was liable for the existence of the nuisance, and its decision in that regard was upheld by the highest Court of the State, and

that decision is final, because no federal question is involved.

*IMMUNITY UNDER FEDERAL CONTROL.*

The remaining question, if any, is whether the fact that the principal part of the washing of respondent's land was done during the period of federal control, relieves the petitioner of liability. If the mere fact that the cause of action arose *during* the period of federal control is sufficient to relieve the respondent of liability, as is contended by the petitioner, and as appears to be the holding of the District Court of the United States for the Eastern District of South Carolina, in the case of Baggot vs. Southern Railroad Company, 300 Federal 337, and no consideration is to be given to the language of order No. 50 of the Director General, providing that actions at law, etc., "based on contract, binding upon the Director General of Railroads, claims for death or injury to persons, or for losses and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation", and practically the same language in the transportation act of 1920, then it is not liable; but in so far as we have been able to find, this is the only case holding that if the cause of action arose during federal control, the Railroad Company is not liable, under any circumstance, without regard to whether the operation of the railroad contributed in any way to the injury complained of or not. The holding in this case is certainly at variance with and contrary to the holding in all other cases on this particular subject, both by the Federal and State Courts. This case was decided in 1924, but the District Court must have entirely overlooked the case of Cumberland Telegraph and Telephone Company vs. Lawrence, 271 Federal 81, decided Febru-

ary 22, 1921, by the Circuit Court of Appeals of the 5th Circuit. This action was brought by Lawrence against the Company to recover damages for the death of plaintiff's intestate, which was caused by the decedent coming in contact, on September 29, 1918, with a galvanized guy wire which the Company had erected in 1913, and had continuously maintained until its lines were taken over by the Government under the Federal Control Acts. The defendant urged that it was not liable, because, at the time of the injury, its property was in the hands of the Federal Government, but the Court held that the Company, having created the nuisance, it was liable for such consequences as might have reasonably been expected, but the Court did not pass on the question whether the Government was also liable on account of having continued to maintain it.

In the case of Hines vs. Woodson, 280 Federal 966, decided January 17, 1922, by the Circuit Court of Appeals for the 7th Circuit, which was an action brought by Woodson against the Wabash Railway Company and the Director General jointly, to recover damages done to plaintiff's land and crops by floods in 1919, during federal control, which floods were caused by brush and other debris drifting and clogging against a bridge erected by the Railroad Company a long time prior to federal control, the ruling of the District Court for the Eastern District of Illinois, holding that the Railroad Company was not liable and dismissing it, was reversed by the Circuit Court of Appeals which held that the Director General of Railroads is not liable for the flooding of land alleged to be due to obstruction of a stream by a bridge built by a Railroad Company many years before the Director General took control of its operation, and of the improper construction of which he was not given notice.

In the case of Brown vs. St. Louis and San Francisco Railway Company, 268 S. W. 679, decided by the Court of Appeals of Missouri on January 26, 1925, which was an action by Brown against the Railway Company to recover damages to the plaintiff's land and crops caused by the failure of the Railway Company to provide and maintain a sufficient opening under a bridge over a creek. The defendant's chief defense was that it was not liable because the overflow and damage accrued while its railroad was in charge of the Government, but the Court held that the defendant was liable, and after referring to numerous decisions, both State and Federal, in which the Courts have held that, for damages for personal injury and other causes arising out of negligence in the operation of the railroad, during the period of federal control, the suit is properly against the Governmental Agency, and the Railroad Company is not liable, because the Railroad Company had nothing to do with the operation of the railroad during that time, and was in no way responsible for what occurred, the Court in its opinion says:

> "This case is different. In this case the Railroad Company built and owned the road bed and that ownership remained during Governmental Control. If there was a defect in the original construction of the road bed, the Railroad Company was directly responsible for it and that responsibility remains until relieved, so the question in this case is whether Governmental Control and operation of the railroad absolved the owner thereof from liability in a case of this kind during the time the road was under the control of the Government and shifted that liability to the Government."

On a motion for rehearing, the Railroad Company called attention to and relied upon the case of Baggot vs. Southern Railroad Company, 300 Federal 337, but the

Court held that the holding in this case was in direct conflict with the holding of the Circuit Court of Appeals in the case of Cumberland Telegraph and Telephone Company vs. Lawrence, 271 Federal 89, which is cited and quoted hereinabove, and the Missouri Court followed the holding of the Circuit Court of Appeals.

In the case of L. & N. Ry. Co. vs. Tuttle, 258 S. W. 688, decided by the Supreme Court of Appeals of Kentucky on February 5, 1924, which was an action by Tuttle against the Railroad Company to recover damages resulting from failure of the Railroad Company to construct a reasonably convenient grade crossing, as required by a contract made prior to federal control, a portion of the damages claimed have accrued prior to the commencement of federal control, and a portion during federal control, the Court found that the Railroad Company had ample opportunity to comply with the contract, both before and after federal control, and held that the Railroad Company was liable for the damages accruing during federal control. In discussing the questions involved, the Court in its opinion says:

> "These are not cases where it is sought to hold a Railroad Company liable for a failure to perform a duty which could only be performed during the period of federal control, and which it then had power to perform. Not only were the contracts executed several years before federal control, but each of the crossings which the jury held were not reasonable and convenient was constructed many months before that time. During all this time the Company had abundant opportunity to comply with its contract, and it will not be heard to say that it was not responsible for the inconvenience accruing during federal control, where, if it had acted with any degree of promptness no such inconvenience would have resulted."

In the case of McPherson vs. Chicago, R. I. & Pac. Ry. Company and the Director General of Railroads, 203 Pac. 912, decided by the Supreme Court of Appeals of Kansas on January 7, 1922, which was an action to recover the costs and expense of the construction of a bridge, which formed part of the approach to a railroad crossing, and which bridge was washed away by a flood during federal control. It was contended by the Railroad Company that the judgment should have been against the Director General only, because the railroad was under federal control at the time the bridge was washed away, but the Court held that the judgment was properly against the Railroad Company, and, in its opinion, says:

> "This cause of action arose during federal control of railroads, but was not caused by that control, nor did the cause of action arise out of such control. The obligation that is sought to be enforced arose when the railroad was built, has existed continuously from that time to the present, and no reason has been shown why the judgment was not properly rendered against the Railroad Company."

The Supreme Court of New York County, in January 1919, rendered a similar decision in the case of Morris Avenue Bridge vs. New York Central Railroad Company, 174 N. Y. Supp. 682.

We deem it unnecessary to argue the proposition that, although the one who constructs a nuisance may be liable for the injurious effects resulting therefrom, yet one who purchases the ground on which the nuisance exists is also liable providing he maintains it with knowledge of its continuous or intermittent injurious effects, as the petitioner did in this case, nor do we deem it necessary to argue the proposition that, aside from the obligation of the contract, the petitioner had actual knowledge of the

existence of this nuisance and its evil effects, and its duty to abate the nuisance existed from the time it acquired the railroad, and it makes no difference whether the Director General was also liable or not. If the petitioner had knowledge of the existence of the nuisance, it was its duty to abate it, whether it was required to do so by way of a formal notice from the respondent or not, because formal notice to abate is unnecessary where knowledge exists.

The case of Atlantic Coast Line Ry. Co. vs. Southern Cotton Oil Mills, 129 Va. 323, 106 S. E. 337, and Reno vs. Seaboard Air Line Ry Co., 120 S. C. 7, 112 S. E. 439, are not in conflict with any of the cases hereinabove cited, because the only question passed upon in those cases was whether the Director General had maintained the nuisance that had been created by the Railroad Company with knowledge of their existence, and was therefore liable for the injuries caused. This is all that is held in either of the cases. In neither of them does the Court hold that the Railroad Companies were not also liable. The rule that the creator of a nuisance and the person who maintains it with knowledge of its existence and its evil effects are both liable is so well ectablished that we deem it unnecessary to cite any additional authority.

We therefore submit that the judgment of the Circuit Court of Wyoming County, West Virginia, is correct, that the action of the Supreme Court of Appeals of West Virginia in refusing to review this judgment is correct, and that the judgment should be affirmed by this Court.

J. Albert Toler,
Mullens, West Virginia.
Counsel for Respondent.